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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/607,227	06/26/2003	William E. Spindler	WCI0002.US	5896

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BARNES & THORNBURG LLP  
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FORT WAYNE, IN 46802

EXAMINER
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CARRILLO, BIBI SHARIDAN

ART UNIT	PAPER NUMBER
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1792

NOTIFICATION DATE	DELIVERY MODE
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10/22/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b> 10/607,227	<b>Applicant(s)</b> SPINDLER, WILLIAM E.	
	<b>Examiner</b> Sharidan Carrillo	<b>Art Unit</b> 1792	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 10/9/09.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 37-84 is/are pending in the application.
- 4a) Of the above claim(s) 81, 83 and 84 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 37-80 and 82 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 37-84 are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

**DETAILED ACTION**

***Election/Restrictions***

1. Newly submitted claims 81, and 83-84 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons:

- I. Claims 37-80 and 82, drawn to a method of cleaning, classified in class 134, subclass 42.
- II. Claims 81 and 83-84, drawn to a composition, classified in class 510, subclass 218.

The inventions are distinct, each from the other because of the following reasons:

2. Inventions I and II are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case, the composition as claimed can be used in a materially different process such as laundry detergent.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 81 and 83-84 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 47-52, 56, 58, 62-67, 70, 73-74, and 79 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 37 recites the language of “consisting essentially of”, which is closed language. However, claim 47, which is dependent on claim 37 recites includes” which is open-ended. The dependent claim is indefinite because it recites open-ended language, but is dependent on an independent claim, which recites closed language. Claims 48, 56, 58, 62-63, 70, 73-74 and 79 are indefinite because of similar reasons. Additionally, claims 50, 56, 65, 70, and 79 recite the open ended language of comprising.

***Claim Rejections - 35 USC § 102***

5. Claims 37-80 are rejected on the ground of Res Judicata where it was based on a prior adjudication, against the inventor on the same claim, a patentably nondistinct claim, or a claim involving the same issue. In re Freeman, 30 F.3d 1459, 31 USPQ 2d 1444 (Fed. Cir. 1994). Edgerton v. Kingland , 168 F. 2d 121, 75 USPQ 307 (D.C. Cir. 1947). In re Szwarc , 319 F.2d 277, 138 USPQ 208 (CCPA 1963). In re Katz , 467 F.2d 939, 167 USPQ 487 (CCPA 1970) (prior decision by District

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Court). Specifically claims 37-80 are rejected on the ground of Res Judicata since an earlier decision of affirmation was rendered by the Board of Appeals on 7/30/09 (MPEP 706.03 (w)).

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 37-51, 53-66, 68-77, and 79 are rejected under 35 U.S.C. 102(b) as being anticipated by Arbogast et al. (5739327).

Re claims 37-40, 57-59 and 71, Arbogast teach a method of cleaning hard surfaces comprising a first chamber comprising hydrogen peroxide and a second chamber comprising an alkaline solution sufficient to maintain the pH to greater than about 8, in the range of 8.5 to 10.5 (col. 9, lines 15-65). Applicant's claim language of "consisting essentially of" does not overcome the teachings of the reference because applicant has not submitted factual evidence to show that the nitrile activator of Arbogast does not materially affect the basic and novel characteristics of applicant's claimed invention. The burden rests on applicant to establish that the nitrile activator of Arbogast does not materially affect the basic and novel characteristics of applicant's claimed invention. Arbogast teaches the components in a liquid or solid matrix (col. 9, lines 20-25, lines 63-68, Example 7 teaches granular compositions. Re claims 41-44, the limitations are inherently met since Arbogast teach the claimed surfactants. Re

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claim 45, col. 6, lines 60-63, col. 8, lines 59-60. Re claim 46, the limitations are inherently met since col. 9, lines 5-9 teaches the pH maintained in the acidic range. Re claims 47-51, 62-66, 73-77, refer to col. 8, lines 7-45. Re claims 53-54, 56, 68, 70, 79, refer to col. 8, lines 60-65. Re claims 55, 69, refer to col. 9, lines 10-15. Re claim 60, refer to col. 9, lines 45-47. Re claim 61, refer to col. 9, lines 60-65. Re claim 72, refer to col. 9, lines 50-54.

8. Claims 37-47, and 53-55 are rejected under 35 U.S.C. 102(b) as being anticipated by Rees (5743514).

Rees teaches a method of cleaning a hard surface comprising a first vessel comprising peroxide and a second vessel comprising an alkaline agent (col. 6, lines 10-15) to raise the pH within the range of from 7-13 (claim 18). Re claim 38, refer to col. 2-3 bridging. Re claim 39, refer to col. 3, lines 20-22. Applicant's claim language of "consisting essentially of" does not overcome the teachings of the reference because applicant has not submitted factual evidence to show that the lactones of Rees do not materially affect the basic and novel characteristics of applicant's claimed invention. The burden rests on applicant to establish that the lactones of Rees do not materially affect the basic and novel characteristics of applicant's claimed invention. Re claim 40, refer to col. 3, lines 25-31. Re claims 41-44, the limitations are inherently met since Rees teaches the addition of surfactants of the cleaning solution. Re claim 45, refer to col. 4, lines 30-35. Re claim 46, refer to col. 3, lines 25-27. Re claim 47, refer to col. 5, lines 65-66. Re claim 53, see col. 11, lines 30-32. Re claim 54, col. 5, lines 50-53. Re claim 55, refer to claim 18.

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9. Claims 37-51 and 53-56 rejected under 35 U.S.C. 102(b) as being anticipated by Thompson et al. (6391840).

Re claims 37, 39, Thompson et al. teach a composition for cleaning and disinfecting surfaces. Col. 4-5 bridging teaches a two chamber container comprising a) hydrogen peroxide in first chamber and an alkali component in a second chamber, the alkali component raising the pH of the solution to a pH of 11 (col. 14, lines 1-25). Applicant's claim language of "consisting essentially of" does not overcome the teachings of the reference because applicant has not submitted factual evidence to show that the imines or oxaziridines of Thompson do not materially affect the basic and novel characteristics of applicant's claimed invention. The burden rests on applicant to establish that the imines or oxaziridines of Thompson do not materially affect the basic and novel characteristics of applicant's claimed invention. Re claim 38, refer to col. 12, lines 7-15. Re claims 40-44, refer to col. 5, lines 5-25. Re claim 45, refer to col. 5, lines 50-55. Re claim 46, refer to col. 5, lines 60-63, col. 14, Example 2. Re claims 47-51, col. 9-col. 10. Re claim 53, example 2. Re claim 54, col. 2, lines 50-51. Re claim 55, col. 12, lines 5-15. Re claim 56, col. 9, lines 30-33, lines 55-60, col. 5, lines 50-56, col. 2, lines 45-54.

### ***Claim Rejections - 35 USC § 103***

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the

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subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining

obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

12. Claims 52, 67, 78, 80 and 82 are rejected under 35 U.S.C. 103(a) as being unpatentable over Arbogast et al. (5739327).

Arbogast et al. teach the invention substantially as claimed with the exception of the diphenyl sulfonate. However, it would have been within the level of the skilled artisan to have modified the method of Arbogast to include diphenyl sulfonates



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since Arbogast teaches that anionic surfactants include sulfonates and linear and branched benzene sulfonates. Arbogast fails to teach the size of the container.

However, it would have been well within the level of the skilled artisan to adjust the size of the container depending upon the surface area of the substrate to be cleaned.

Clearly, a larger container would be advantageous for cleaning larger surface areas.

Changes in size of an article were held to be obvious. In re Rose 105 USPQ 237 (CCPA 1955).

Re claim 82, Arbogast teaches that it is well known in the art to clean and remove stains using a control composition consisting of detergent and peroxide only (Table 6). Specifically, Arbogast recognizes that it is well known to use a two component composition. Therefore, applicant's claimed composition of a hydrogen peroxide and alkaline component is no different from the control compositions, cited in Tables 6 and 7 (col. 17-18) of Arbogast et al. Tables 6 and 7 teach that it is well known to have a composition consisting of the peroxide and an alkaline ingredient (i.e. sodium bicarbonate/sodium carbonate), applicant's claimed composition. Furthermore, col. 9, lines 15-35+ teaches that dual delivery systems are used separate components of a cleaning composition prior to use. Therefore, it would have been within the level of the skilled artisan to have modified to method of Arbogast to include using a dual delivery sprayer or dispenser system for the control compositions as well, as a conventional means of applying the cleaning composition to the substrate surface.

13. Claim 52 is rejected under 35 U.S.C. 103(a) as being unpatentable over Thompson et al. (6391840).

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Thompson et al. teach the invention substantially as claimed with the exception of the diphenyl sulfonate. However, it would have been within the level of the skilled artisan to have modified the method of Thompson to include diphenyl sulfonates since Thompson teaches that anionic surfactants include sulfonates and linear and branched benzene sulfonates.

14. Claim 82 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rees (5743514).

Comparative Examples 1 and 2 (col. 7-8 bridging) teaches a composition consisting of the peroxide and alkaline component (i.e.  $\text{Na}_2\text{CO}_3$ ), without the presence of lactone. Therefore, applicant's claimed composition of a hydrogen peroxide and alkaline component is no different from the compositions recited in the comparative Examples 1 and 2 of Rees. Examples 1 and 2 teach that it is well known to have a composition consisting of the peroxide and an alkaline ingredient. Additionally, col. 6, lines 45-55 teaches using separate containers or a single container having two compartments for spraying the cleaning composition on the substrate surface. In view of the teachings of Rees, it would have been within the level of the skilled artisan to have modified to method of Rees to include using a dual delivery sprayer or dispenser system for the control compositions as well, as a conventional means of applying the cleaning composition to the substrate surface.

***Response to Arguments***

15. Applicant's submits a 1.132 Declaration, citing the corrosive nature of bleach to overcome the 102b rejections of Arbogast, Rees, and Thompson. Applicant further argues that based on the Board of Appeals Decision, applicant has provided evidence that demonstrate that the bleach activators taught by the prior art materially affect the basic and novel characteristics of the claimed invention. The 102(b) creates a statutory bar and a 1.132 Declaration will not overcome the statutory bar rejections (MPEP 2136.05, 706.02 b). Evidence of secondary considerations is irrelevant to 35 U.S.C. 102 rejections and thus cannot overcome a rejection so based. In re Wiggins, 488 F.2d 538, 543, 179 USPQ 421, 425 (CCPA 1973) (MPEP 2131.04). Furthermore, even if the claims were unpatentable over the prior art of Arbogast, Rees, and Thompson, the Declaration would not be persuasive because applicant's declaration is a compilation of research articles showing the corrosive nature of bleach. If applicant contends that additional steps or materials in the prior art are excluded by the recitation of "consisting essentially of," applicant has the burden of showing that the introduction of additional steps or components would materially change the characteristics of applicant's invention. In re De Lajarte, 337 F.2d 870, 143 USPQ 256 (CCPA 1964). See also Ex parte Hoffman, 12 USPQ2d 1061, 1063-64 (Bd.Pat. App. & Inter. 1989) (MPEP 2111.02). Applicant has not provided convincing evidence to compare applicant's invention prior to the addition of the nitrile activator, lactone, and imine and applicant's invention after the addition of nitrile activator, lactone, and the imine and whether the additional prior art components materially affect the basic and novel characteristics of

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applicant's claimed invention. Specifically, applicant's declaration is not commensurate in scope with applicant's claimed invention. Applicant has not shown how the nitrile, lactone, and imine, as taught by the prior art, materially affect the basic and novel characteristics of applicant's claimed invention. According to the Board's Analysis, Appellant's Specification provides that "[t]he cleaning compound generally includes a peroxide (peroxygen compound) and an alkaline reactant" which does not limit the active bleaching chemical to exclude peracids, which are peroxygen compounds (Spec. 3, 1.22-23). This is in accord with Thompson, one of the anticipatorily applied references, which discloses that peroxygen compounds include organic or inorganic peracids and persalts, such as perborates, in addition to hydrogen peroxide (col. 5, 11.39-50). Furthermore, each of the applied references employ alkaline material (reactant) in addition to a peroxygen compound for cleaning surfaces, as we noted above.

16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sharidan Carrillo whose telephone number is 571-272-1297. The examiner can normally be reached on M-W, F 6:30-5:00pm, alternating Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Barr can be reached on 571-272-1414. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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